

5/18/09

(18)

Christine Joyce

From: Roland Bartl
Sent: Wednesday, May 13, 2009 11:26 AM
To: Manager Department
Cc: Planning Department
Subject: Site Plan #417 - draft decision and draft extension of enforcement deadline

See the attached for action at the May 18 Board of Selectmen meeting. The Board has already voted to deny the site plan special permit application. This is simply the decision with iteration of reasons for the denial vote. I do not think another vote is necessarily required here. However, the Board should be satisfied with what the decision says. The Board had also voted to extend the cease and desist order deadline to October 31. A letter to this effect is attached for Steve's signature.

The decision due date after the hearing extension is not until 90 days after 4/27. The current enforcement order deadline is May 31. I would recommend issuing both the decision and the enforcement order deadline extension before May 31.

Roland Bartl, AICP
Planning Director
472 Main Street
Acton, MA 01720
(978) 264-9636

5/13/2009



Board of Selectmen

TOWN OF ACTON

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DECISION

#01/23/09-417

107-115 Great Road
(Wetherbee Plaza Extension)

Site Plan Special Permit (Friedrichs)
May 18, 2009

DENIED

Decision of the Acton Board of Selectmen (hereinafter the Board) on the application of Leo Bertolami, Wetherbee Plaza LLC, 6 Proctor Street, Acton, MA (hereinafter the Applicant) for property located at 107-115 Great Road in Acton, Massachusetts. The applicant owns the property. It is shown on the 2007 Acton Town Atlas; map G-4 as parcel 28, 28-1 & 50 (hereinafter the Site).

This Decision is in response to an application for a site plan special permit, submitted to the Board on January 23, 2009, pursuant to Section 10.4 of the Acton Zoning Bylaw (hereinafter the Bylaw) and the Site Plan Special Permit Rules and Regulations (hereinafter the Rules). The Board opened the public hearing on March 9, 2009 and continued it to April 27, 2009. The Board heard testimony at both hearing sessions. Board members Paulina Knibbe (Chair), Terra Friedrichs, and Lauren Rosenzweig attended at both hearing sessions. Selectman Mike Gowing attended the April 27 hearing session and examined a video recording of the March 9 session.

The minutes of the hearing and submissions on which this decision is based upon may be referred to in the Town Clerk's office or the office of the Board at the Acton Town Hall.

1 EXHIBITS

Submitted for the Board's deliberation were the following exhibits:

- 1.1 A "Site Plan Special Permit Application" package compiled by Acton Survey & Engineering, Inc. with the following:
 - Application cover letter, dated 01/23/09;
 - Application form dated 01/22/09;
 - Abutters list;
 - Use description;
 - List of other permits and variances;
 - Drainage Calculations;
 - Site Plan entitled "Wetherbee Plaza Extension" last revised 04/09/09, prepared by Acton Survey & Engineering, Inc., consisting of 7 sheets.
 - Proposed ANR "Plan of Land, 97-115 Great Road, Acton, Massachusetts" dated 01/15/09.
 - Building floor & elevation plans for the site on record in the Acton Building Department.
- 1.2 Interdepartmental communication was received from:
 - Tree Warden & Municipal Properties Director, dated 01/28/09 and 04/14/09;
 - Engineering Department, dated 02/03/09, revised 03/03/09 and 04/17/09;
 - Engineering Department e-mails dated 03/10/09 and 04/17/09;
 - Health Department, dated 02/04/09 and 04/22/09;
 - Sidewalk Committee, dated 02/13/09;
 - Design Review Board, dated 02/18/09;
 - Natural Resources Director, dated 02/19/09;
 - Fire Chief, dated 02/20/09 and 03/06/09;
 - Transportation Advisory Committee, dated 02/23/09 and 04/26/09;
 - Water Supply District, dated 02/24/09;
 - Planning Department, dated 03/05/09 and 04/21/09;
 - Planning Department internal e-mail, dated 03/03/09; and
 - Building Department, dated 03/06/09.
- 1.3 Other correspondence and materials (some with attachments):
 - Copy of previous Site Plan Special Permit #11/07/03-393.
 - Memo from Planning Department to Design Review Board, dated 02/18/09.
 - Letter from Acton Survey & Engineering, Inc. dated 02/04/09.
 - Letter from Acton Survey & Engineering, Inc. dated 02/24/09.
 - Letter from Acton Survey & Engineering, Inc. dated 03/03/09.
 - Letter from Acton Survey & Engineering, Inc. dated 03/05/09.
 - Letter from Acton Survey & Engineering, Inc. dated 03/06/09.
 - Hearing continuation and time extension agreement, dated 03/09/09.
 - Letter from Planning Department to the Applicant, dated 03/12/09.
 - Letter from Acton Survey & Engineering, Inc. dated 04/09/09.
 - Letter from Acton Survey & Engineering, Inc. dated 04/13/09.
 - Letter from Acton Survey & Engineering, Inc. dated 04/27/09.
 - Miscellaneous e-mail correspondences with subject title containing '107 Great Road', dated between approximately 02/23/09 and 04/27/09.

Exhibit 1.1 is hereinafter referred to as the Plan.

2 FINDINGS AND CONCLUSIONS

Based upon its review of the exhibits and the record of the proceedings the Board finds and concluded that:

- 2.1 The Site was in the Limited Business (LB) zoning district until October 2003, at which time it changed to EAV following a successful zoning change petition filed by the Applicant and/or on behalf of the Applicant.
- 2.2 EAV zoning standards and requirements changed in April 2004 as a result of recommendations contained in the East Acton Village Plan.
- 2.3 Site Plan Special Permit #11/07/03-393 was filed on 11/07/03 after the zoning change from LB to EAV and before zoning standards in the EAV district changed.
- 2.4 For purposes of this decision EAV zoning standards before April 2004 are referred to as "Old EAV Zoning". EAV zoning standards after April 2004 are referred to as "New EAV Zoning".
- 2.5 In accordance with section 8.5 of the Bylaw, Site Plan Special Permit #11/07/03-393 was issued under Old EAV Zoning and protected the Site under Old EAV Zoning "provided that the applicant proceeds diligently to obtain such permit and provided further that the USE or construction is commenced within six (6) months after the issuance of the permit and the expiration of all applicable appeal periods. In cases involving construction, such construction shall be continued through to completion as continuously and expeditiously as is reasonable, provided however that if such construction has ceased for a period of two or more years it shall be considered abandoned pursuant to Section 8.2.4."
- 2.6 Although the Applicant has made slow progress completing the site improvements authorized in Site Plan Special Permit #11/07/03-393, the Site remains protected under Old EAV Zoning. Driveways, parking lots, walkways and sidewalks remain unfinished or are installed in deviation from the approved site plan.
- 2.7 Most notably, building #107 Great Road is in a different location than approved under Site Plan Special Permit #11/07/03-393, and it violates the applicable Old EAV Zoning minimum 10-foot side yard setback to the southern lot line. Steps and A/C units of building #107 Great Road actually extend over the lot line.
- 2.8 Mr. Bertolami / Wetherbee Plaza, LLC owns the Site and the immediately abutting property to the south.
- 2.9 According to testimony at the public hearing the Applicant had decided to move the building 10 feet to the east because New EAV Zoning requires no side yard setback. In doing so, the Applicant ignored that Old EAV Zoning still applies to the Site.
- 2.10 The Town has issued no Certificate of Occupancy for the #107 Great Road building due to the zoning violation¹. Nevertheless, the Applicant has invited and allowed one business tenant to occupy the rear unit. The Town, for now, has chosen to postpone zoning enforcement action, not to evict the illegal tenant at this time, and to be receptive instead to the Applicant's corrective actions.
- 2.11 The Applicant had two options to achieve zoning compliance:

¹ The building #113 Great Road (Carriage House) remains vacant. The building #115 Great Road (Ranor House) is legally occupied.

- (A) (A) Bring the entire Site into compliance with Old EAV Zoning and with the Site Plan Special Permit #11/07/03-393; or
 - (B) (B) Waive protections from Old EAV Zoning and filing a new site plan special permit application with changes to bring the entire Site into compliance with New EAV Zoning.
- 2.12 The Applicant has not waived zoning protections. He filed Site Plan Special Permit Application #01/23/09-417, which is the subject of this Decision. With his application the Applicant initially followed option (B) above and sought to demonstrate that, with certain modifications to the Site, compliance with New EAV Zoning could be achieved.
- 2.13 As shown on the Plan, the Site would not comply with New EAV Zoning. The Board cannot approve the Plan as a way forward to solve the zoning violation on the Site. While the change to New EAV Zoning would remedy the side yard violation of the #107 Great Road building and allow it to remain on the lot line where it was built, the Plan does not comply with many standards of New EAV Zoning, including but not limited to the following:
- a. Under New EAV Zoning the front yard setback must be between 10 and 20 feet. The front yards for both buildings #107 and #115 Great Road are far greater than 20 feet.
 - b. New EAV Zoning standards require that 60% of the lot's space within 20 feet of the front lot line is occupied by buildings or a pedestrian plaza. The Plan shows no buildings within the required front area of the lot and one miniature pedestrian plaza covering less than 10 percent of the required area.
 - c. New EAV Zoning standards require that BUILDING fronts have setbacks only to accommodate sidewalks and/or pedestrian plazas or amenities. The buildings on the Site have drainage facilities in their front yards.
 - d. The Board could waive the aforesaid 60% requirement to some lesser number if it finds that the alternative design features are consistent with the purpose and intent of the special dimensional regulations of the New EAV Zoning (Bylaw section 5.5B.1.2.g)i.). The Applicant alternately proffered a pergola, a bank ATM cubicle, and/or a small pedestrian plaza near the front lot line in attempts to nominally address the Site's problems with the front yard compliance under New EAV Zoning in hopes the Board might grant a waiver. However, none of these propositions are sufficient to meet the purpose and intent of the special dimensional regulations of the New EAV Zoning.
 - e. Business entrances at the #107 Great Road building are on the side. New EAV Zoning requires them to be in the front.
 - f. Under New EAV Zoning roofs must have a 9/12 pitch or greater, or if multi story the roof can be flat. The roof of the #107 Great Road building is not flat and has a pitch less than 9/12.

The Applicant has not shown any Plan that would overcome these compliance problems with New EAV Zoning appear insurmountable.

- 2.14 After two hearing sessions and repeated reviews by Town staff of plans, revised plans, and numerous engineering memoranda filed on behalf of the applicant, the Board finds that the Plan fails to demonstrate compliance with New EAV Zoning.
- 2.15 The Applicant is not without a remedy. He can pursue option (A) above. Because he owns the site and the adjacent property, he can remove the offending side lot line and merge the two lots into one; then he can file an application for a site plan special permit amendment to seek the Board's approval of the present location of the #107 Great Road

building; and he can complete the Site development in accordance with Site Plan Special Permit #11/07/03-393.

- 2.16 The applicant has raised other concerns with the Site Plan Special Permit #11/07/03-393 and Town staff has identified numerous site improvements that were not done in accordance with said Site Plan Special Permit. However, none of these matters are fundamental to the question of compliance with Old or New EAV Zoning. Rather, they amount to the Applicant's failure to exercise due diligence when developing the Site, or in the alternative they reflect the Applicant's preferences as opposed to the Site Plan Special Permit's requirement. The Applicant can easily comply with all of these items. These matters do not require resolution in this decision and do not rise to a level of importance that would justify the Board's further involvement.

3 BOARD ACTION

Therefore, the Board voted to DENY the requested Site Plan Special Permit. The Applicant is advised to complete the Site expeditiously in accordance with the previous Site Plan Special Permit #11/07/03-393.

4 APPEALS

Appeals, if any, shall be made pursuant to MGL, Ch. 40A, S. 17 and shall be filed within 20 days after the date of filing this decision with the Town Clerk.

The Town of Acton Board of Selectmen

Paulina Knibbe, Chair

This is to certify that the 20-day appeal period on this decision has passed and there have been no appeals made to this office.

Eva Taylor, Town Clerk

Date

Copies furnished:

Applicant -	Building Commissioner	Health Director
certified mail #	Engineering Administrator	Municipal Properties Director
Town Clerk	Conservation Administrator	Town Manager
Fire Chief	Police Chief	Acton Water District
Owner	Historical Commission	Assistant Assessor
Design Review Board	Concord Water Department	



Town Manager

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May 18, 2009

BY CERTIFIED MAIL - RRR

Certified mail #: _____

Mr. Leo Bertolami
Wetherbee Plaza, LLC
6 Proctor St
Acton, MA 01720

Re: Ongoing zoning violations on your Site at 107-115 Great Road

Mr. Bertolami:

Please be advised that the Acton Board of Selectmen, at their May 18, 2009 meeting, has further reviewed all matters related to the inappropriate and unauthorized site development at 107 – 115 Great Road and the illegal occupancy by Terrene Sustainable Building Supply in the rear third of the building at 107 Great Road.

The Board had agreed not to enforce the Cease and Desist Order for the vacating of the premises by Terrene Sustainable Building Supply, which the Zoning Enforcement Officer originally issued on November 24, 2008 and reissued on December 24, 2008, until March 31, 2009 in order for you to complete and file with the Board a new site plan special permit application that would remedy the zoning violations. You filed a new site plan special permit application seeking to convince the Board that it complies with new East Acton Village zoning as in effect today. The Board further extended the no-enforcement period until May 31, 2009 to allow you more time to work out the zoning issues of the site plan. The Board remained unconvinced and finally denied your site plan application for lack of zoning compliance.

Recognizing that you have another path to potentially achieve zoning compliance, the Board agreed to further extend the no-enforcement period to October 31, 2009. This is to allow you

the time you said you needed to bring the site into compliance with the older EAV zoning standards that still apply to the site; to arrange for a merger with the adjacent car wash lot that you own, which would cure the side yard violation for the #107 Great Road building; and to generally complete the site as approved in the earlier site plan special permit issued on March 22, 2004 (#11/07/03-393), and to arrange for any minor amendments that may be necessary to achieve compliance with both zoning and the 2004 site plan special permit.

As stated in the previous extension of the Cease and Desist Order, this letter does not indicate or guarantee approval of any remedial steps you may take towards curing the Site's zoning problems or of any further site plan special permit applications or amendment proposals that you may file with the Board of Selectmen.

In addition, this further extension of the no-enforcement period of the Cease and Desist Order only applies to the present illegal tenant Terrene Sustainable Building Supply. It does not extend to any additional tenants in the building or to any tenant that may succeed Terrene.

Please be aware that violations of the Zoning Bylaw are subject to a fine of \$300 per day. It is the Board of Selectmen's intent that this is the last no-enforcement extension of this Cease and Desist Order and that your failure to bring the Site into full zoning compliance on or before October 31, 2009 shall result in the zoning enforcement by the Town to the fullest extent under applicable law.

Sincerely,

Steven L. Ledoux
Town Manager

Cc: Board of Selectmen
Scott Mutch, Zoning Enforcement Officer
Roland Bartl, Planning Director
Frank Ramsbottom, Building Commissioner
Mark Donohoe, Acton Survey and Engineering Inc.
Terrene Sustainable Building Supply
Stephen Anderson, Town Counsel